Supreme Court, U.S.
FILED

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

WOLVERINE, LTD., SHELDON M. SISSON, A PARTNER OTHER THAN TAX MATTERS PARTNER; WOODCHUCK, LTD., SHELDON M. SISSON, A PARTNER OTHER THAN TAX MATTERS PARTNER,

PETITIONERS

V.

COMMISSIONER INTERNAL REVENUE SERVICE,

RESPONDENT

APPENDIX, VOLUME II OF II, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sheldon M. Sisson
Counsel of Record
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Rule 14 (k)(ii):

The United States Tax Court denied the following motions made by Petitioners in this case, endorsing the Petitioners' motions "denied," without the entry of an order.

Each motion was filed in Wolverine, Ltd., Sheldon M. Sisson, a partner other than the tax matters partner and Woodchuck, Ltd., Sheldon M. Sisson a partner other than the tax matters partner v. Commissioner of Internal Revenue, Docket No. 26539-90.

1. "Objection to the Assignment of This Case to Judge Mary Ann Cohen and Motion that the Chief Judge of the United States Tax Court Assign This Case to a Judge Other Than Mary Ann Cohen, [all capitals in the original]" filed April 26, 1991 and denied May 1, 1991.

2. "Motion for Reconsideration of Findings of Fact and Opinion, [all capitals in the original]" filed December 24, 1992 and denied December 30, 1992.

3. "Motion to vacate or revise decision, [all capitals in the original]" filed January 4, 1993 and denied January 4, 1993.

SETTLEMENT PLAN AGREEMENT

1. PARTIES

This Settlement Plan Agreement is made and entered into by and between GERALD L. SCHULMAN ("SCHULMAN") and the INTERNAL REVENUE SERVICE ("IRS").

2. RECITALS

2.1 IRS is presently auditing SCHULMAN'S individual tax returns (IRS Form 1040) for the years 1976 through 1982. Additionally, IRS intends to audit SCHULMAN'S 1983 individual tax return (IRS Form 1040).

2.2 SCHULMAN is the general partner of approximately four hundred seventy-eight (478) partnerships which are engaged in the business of leasing real property to United States post offices or public utilities ("SCHULMAN Partnerships").

2.3 Each SCHULMAN Partnership

generated an ordinary loss to each limited partner in an amount equal to his investment in the SCHULMAN Partnership, which loss was taken by the investor in the year of his investment ("Investor First Year Deduction"); provided, however, certain limited partners have received a deduction in excess of his investment ("Additional Investor First Year Deduction"). The Additional First Year Deduction is based upon the following SCHULMAN Partnership items:

(a) Rental income;

(b) Depreciation on a straight line basis;

(c) Interest on the long term note; and

(d) Maintenance and insurance.

The amount of the Additional Investor First Year Deduction varied according to

the time of the limited partner's investment in the SCHULMAN Partnership.

2.4 IRS and SCHULMAN desire to amicably settle all questions relating to SCHULMAN'S individual tax returns and the deductions taken by the investors in connection with their investment in the SCHULMAN Partnerships. Notwithstanding the foregoing, Phase II as described in Paragraph 2.6 hereof may be finalized before completion of the examination of SCHULMAN'S 1040 tax returns relating to items other than post office promoter income and expenses.

2.5 This document is intended to be an agreement in principle establishing the concepts upon which a formal settlement agreement will be drafted. Both the IRS and SCHULMAN shall exercise the utmost good faith in attempting to achieve the final

settlement of the matters described herein. Nevertheless, SCHULMAN and the IRS acknowledge that the concepts established hereunder may result in unforeseen consequences which may render settlement impossible.

2.6 The parties have discussed a settlement plan which consists of Phase I and Phase II as follows:

(a) Phase I -- This phase involves (i) the execution of this Settlement Plan Agreement establishing the principles upon which a final settlement agreement will be achieved and (ii) actual verification of tax due in accordance with the principles established under the Settlement Plan Agreement. Verification shall be conducted on an expedited basis.

(b) Phase II -- Phase II shall involve (i) drafting and execution of a

final settlement agreement, (ii) communication to investors of the settlement proposal by SCHULMAN, (iii) implementation of the Partnership adjustments upon acceptance by the investors, (iv) final determination of SCHULMAN promoter income, and (v) formation of the Trust pursuant to Paragraph 3 hereof.

3. SETTLEMENT PLAN

Subject to the terms and conditions herein, the parties hereto agree as follows:

3.1 IRS shall allow each investor to deduct seventy percent (70%) of the claimed Investor First Year Deduction. The disallowed portion of the Investor First Year Deduction [thirty percent (30%)] shall be deducted by each investor ratably over the term of the SCHULMAN Partnership Long Term Notes as

defined in Paragraph 3.8 hereof.

3.2 Except as provided in Paragraph 3.1 and adjustments pertaining to items unrelated to the SCHULMAN Partnerships, IRS shall make no other adjustment to the SCHULMAN Partnership tax returns or to the investor 1040 tax returns, except for adjustments required for the issuance of refunds by IRS to investors.

3.3 Bills reflecting assessments (plus interest) and refund checks or credits (plus interest) will be simultaneously sent out by IRS to investors.

3.4 SCHULMAN will use his best efforts to effectuate the settlement with the investors and in connection therewith SCHULMAN agrees to submit proposed correspondence to investors pertaining to the settlement to the IRS.

3.5 The parties shall draft an appropriate Closing Agreement for each investor in the SCHULMAN Partnerships.

3.6 It is agreed that only "open" years shall be impacted by this Agreement and the final settlement agreement. The income tax liability, if any, for any year closed by virtue of the statute of limitations shall be and remain unchanged subject to the mitigation provisions of Section 1311, which shall be available to both parties.

3.7 SCHULMAN Promoter Income -- In order to determine SCHULMAN'S "promoter income" for the years 1977 through and including 1983 in connection with the funds invested by the limited partners and others (if any) in the SCHULMAN Partnerships, IRS and SCHULMAN have agreed upon the following audit

principles:

(a) Promoter ordinary gross income shall be equal to the excess of the total capital contributions made by the limited partners and others (if any) to the SCHULMAN Partnerships in excess of the total cash down payments for the purchase of each SCHULMAN Partnership property plus all other costs in acquiring the property, including without limitation recording fees and escrow expenses.

(b) SCHULMAN shall be entitled to deduct the following promoter expenses: (i) all commissions paid in connection with the purchase and sale of the Partnership's property provided said commissions were not deducted under Paragraph 3.7(a) above; (ii) cost of operations -- U.S.; (iii) cost of operations -- foreign; (iv) cost of

operations -- Margolis; (v) SCHULMAN Partnership losses (losses based on SCHULMAN'S interest in the SCHULMAN Partnerships); and (vi) postal management deficit for taxable years prior to 1984.

Attached hereto as EXHIBIT A [not included in the Appendix but forming part of the record in the United States Tax Court] are sample work papers embodying the aforesaid principles for the year 1981, which work papers shall serve as a model for reporting the audit results of the SCHULMAN 1040 individual income tax returns for the years 1976 through and including 1983. The scope and manner of the examination will be at the discretion of the Examination Division. In particular, all items of income, expense and loss reflected on SCHULMAN'S 1040 income tax returns for

the years 1976 through and including 1983 arising out of or in connection with Partnerships originally organized to purchase real property but which in fact did not purchase real property, shall be deleted from the aforesaid SCHULMAN 1040 returns. In the event a deficiency is determined, SCHULMAN shall pay interest as required by law; on the other hand, in the event SCHULMAN is entitled to a refund, IRS shall pay interest to SCHULMAN as required by law.

3.8 SCHULMAN Trust Income--SCHULMAN shall use his best efforts to domesticate the SCHULMAN Partnership long term promissory notes made payable to the sellers of the buildings to the SCHULMAN Partnerships ("SCHULMAN Partnership Long Term Notes"). SCHULMAN shall deposit the SCHULMAN Partnership Long Term Notes in a trust ("SCHULMAN

Trust") and IRS Form 1041 shall be filed each year. Commencing with 1977, the SCHULMAN Trust's taxable income shall be determined as follows:

(a) First: Realized SCHULMAN Trust interest income shall be computed by including all management fees received by SCHULMAN for managing the SCHULMAN Partnership properties (the aforesaid management fees shall not be reported on SCHULMAN 1040 returns) and all interest payments received by the SCHULMAN Trust pursuant to the SCHULMAN Partnership Long Term Notes and subtracting therefrom (i) all interest payments made by the SCHULMAN Trust in connection with underlying obligations (SCHULMAN Partnership Long Term Note is an all-inclusive obligation which requires the holder thereof to pay all underlying obligations) and (ii) all

payments received by the SCHULMAN Partnerships (which payments were included in SCHULMAN Partnership income) in excess of rental income received by the SCHULMAN Partnerships ("Realized SCHULMAN Trust Interest Income"). No interest shall accrue on Realized SCHULMAN Trust Interest Income.

(b) Second: All allowable expenses incurred in connection with the maintenance, management, and operation of the SCHULMAN Partnerships' properties and business operations ("SCHULMAN Trust Business Expenses") shall be deducted from Realized SCHULMAN Trust Interest Income; provided, however, SCHULMAN Trust Business Expenses must not have been utilized in computing SCHULMAN'S promoter income for the years 1977 through 1983. The difference between Realized SCHULMAN Trust Interest Income

and SCHULMAN Trust Business Expenses shall hereafter be designated "Net Realized SCHULMAN Trust Interest Income." No interest shall accrue on Net Realized SCHULMAN Trust Interest Income.

(c) Third: For each year "Net Available Cash" shall be determined by subtracting (i) all SCHULMAN Trust Business Expenses, (ii) all payments (principal and interest) made by the SCHULMAN Trust in connection with underlying notes and obligations, (iii) all payments received by the SCHULMAN Partnerships (which payments were included in SCHULMAN Partnership income) in excess of rental income received by the SCHULMAN Partnerships, and (iv) all taxes paid pursuant to Paragraph 3.8(f) hereof from all receipts of the SCHULMAN Trust pursuant to the SCHULMAN

Partnership Long Term Notes and management fees.

(d) Fourth: Net Realized SCHULMAN Trust Interest Income shall be recognized as follows:

(1) In the year of receipt by the SCHULMAN Trust, to the extent of Net Available Cash. Income tax shall be paid on the recognized SCHULMAN Trust Interest Income. The net amount of cash remaining after payment of tax shall hereafter be designated "Net After Tax SCHULMAN Trust Cash."

(2) Net Realized SCHULMAN Trust Interest Income not recognized by the SCHULMAN Trust in the year of receipt shall be recognized by the SCHULMAN Trust in any subsequent year in which there is and only to the extent of Net After Tax SCHULMAN Trust Cash. Tax shall be paid on the amount so

recognized.

(e) No tax shall be paid on any distributions made from the SCHULMAN Trust to SCHULMAN or otherwise.

(f) In addition to the income recognized under Paragraphs 3.8(a) through (d) hereof, the SCHULMAN Trust realized income shall also include the difference between the cost of the SCHULMAN Partnership property to the foreign seller and the purchase price paid by the SCHULMAN Partnership for the SCHULMAN for the SCHULMAN Partnership property ("Realized SCHULMAN Trust Short Term Capital Gain on Sale"). The Realized SCHULMAN Trust Short Term Capital Gain on Sale shall be recognized each year pursuant to the installment method of reporting as follows: The gross profit percentage shall be multiplied by the principal amortization

of the SCHULMAN Partnership Long Term Note each year.

(g) In order to secure payment of the Net Realized SCHULMAN Trust Interest Income and Realized SCHULMAN Trust Short Term Capital Gain on Sale ("SCHULMAN Trust Tax"), the parties agree as follows:

(1) The total SCHULMAN Trust Tax shall be projected utilizing the principles established in this Agreement ("Projected SCHULMAN Trust Tax").

(2) A sufficient number of SCHULMAN Partnerships projected to receive rents equal to one hundred twenty percent (120%) of the Projected SCHULMAN Trust Tax shall each execute an assignment of rent in favor of the Internal Revenue Service ("SCHULMAN Partnership Assignment of Rent"); provided, however, the SCHULMAN

Partnership Assignment of Rent shall be for security purposes only and shall become effective only in the event the SCHULMAN Trust defaults in the payment of tax due hereunder. Each SCHULMAN Partnership Assignment of Rent shall be in recordable form and shall be recorded in the county in which the SCHULMAN Partnership owns real property.

(3) As SCHULMAN Trust Tax is paid by the SCHULMAN Trust, the IRS shall fully release and terminate those SCHULMAN Partnership Assignments of Rent representing rents in excess of one hundred twenty percent (120%) of the projected SCHULMAN Trust Tax. Any termination or release of a SCHULMAN Partnership Assignment of Rent as required hereunder shall be a full release and termination of the particular SCHULMAN Partnership

Assignment of Rent involved.

(4) The SCHULMAN Partnership Assignment of Rent shall contain a self executing subordination clause permitting SCHULMAN, the SCHULMAN Partnerships, and the SCHULMAN Trust to refinance underlying encumbrances arising out of and in connection with the purchase of the SCHULMAN Partnership property so long as IRS always remains secured to the extent of one hundred twenty percent (120%) of the Projected SCHULMAN Trust Tax. Further, IRS shall execute such further subordination documents as are reasonably required to permit refinancing of the aforesaid underlying encumbrances.

(5) In the event the SCHULMAN Trust defaults in the payment of SCHULMAN Trust Tax, the IRS, pursuant to the SCHULMAN Partnership Assignment of

Rent, shall (a) collect the assigned rents, (b) deposit said rent in the SCHULMAN Trust, (c) pay all SCHULMAN Trust Business Expenses, (d) pay all underlying encumbrances then due, and (e) collect the SCHULMAN Trust Tax then due. The balance, if any, shall be distributed to SCHULMAN; provided, however, any tax owed by SCHULMAN on his 1040 returns may be collected by the IRS in accordance with applicable law.

(h) The SCHULMAN Trust shall file federal income tax returns (IRS Form 1041) for 1977, 1978, 1979, 1980, 1981, and 1982, which returns shall be filed concurrently with the execution of the Phase II final settlement agreement. Thereafter, the SCHULMAN Trust shall file federal income tax returns (IRS Form 1041) in accordance with law. Interest shall be paid on overpayments

or deficiencies by the SCHULMAN Trust or the Internal Revenue Service as applicable, in accordance with law; provided, however, no interest shall accrue on (1) Realized SCHULMAN Trust Interest Income and Net Realized SCHULMAN Trust Interest Income as defined in Paragraphs 3.8(a) and (b), and (2) Realized SCHULMAN Trust Short Term Capital Gain on Sale as defined in Paragraph 3.8(f) hereof. No penalty of any kind whatsoever shall be assessed against the SCHULMAN Trust for taxable years prior to 1984. SCHULMAN Trust tax returns for the years 1977 through and including 1983 shall be filed with and processed by the Special Procedures section, Los Angeles, California.

3.9 Commencing January 1, 1984, SCHULMAN shall not, directly or indirectly, organize, assist in the

organization of, or participate in the sale of any interest in (i) a partnership or other entity, (ii) any investment plan or arrangement, or (iii) any other plan or arrangement if such partnership, entity, plan or arrangement is an abuse tax shelter as defined by the Internal Revenue Code, utilizes a non-U.S. entity as part of the plan or arrangement, or involves sales which are not at arm's length or at fair market value ("Prohibited Tax Shelter Activity"). For purposes herein, a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement which (i) does not utilize a non-U.S. entity, (ii) involves arm's length sales at fair market value and/or arm's length seller financing, and (iii) utilizes financing from a chartered United States bank,

federal or state savings and loan association, federal or state thrift institution, United States insurance company, domestic money market fund, or domestic pension plan shall not be a Prohibited Tax Shelter Activity; provided, however, such activity must not be an abusive tax shelter as defined under the Internal Revenue Code.

Appropriate language shall be drafted for the Phase II final settlement agreement granting to the IRS sufficient equitable remedies to enable IRS to enjoin SCHULMAN if SCHULMAN in fact engages in any such Prohibited Tax Shelter Activity. Further, IRS shall keep confidential all provisions of this subparagraph unless disclosure is required by law; provided however, in the event SCHULMAN breaches the terms of this subparagraph, IRS may make such

disclosures as are necessary to enforce its rights hereunder.

The penalty provisions under Section 6700 of the Internal Revenue Code shall be applicable to any breach of this subparagraph.

3.10 SCHULMAN shall on an expedited basis copy and turn over to the IRS all SCHULMAN Partnership documents listed on EXHIBIT B [not included in the Appendix but forming part of the record in the United States Tax Court] hereto for each SCHULMAN Partnership for all open years ("SCHULMAN Partnership Documents"); provided, however, SCHULMAN need not copy and turn over SCHULMAN Partnership documents previously turned over to the IRS.

SCHULMAN shall deliver SCHULMAN Partnership Documents to the IRS on a daily basis. Further, SCHULMAN shall

complete the copying and delivery of the SCHULMAN Partnership Documents to the IRS within thirty (30) working days from the date hereof. For convenience only, SCHULMAN Partnership checks issued in years subsequent to the initial year of the Partnership's organization (item 6 on EXHIBIT B) shall be copied and delivered to IRS after all other SCHULMAN Partnership Documents have been delivered to the IRS.

Following the complete delivery of all SCHULMAN Partnership Documents described above, all records listed on EXHIBIT C [not included in the Appendix but forming part of the record in the United States Tax Court] hereto in SCHULMAN'S possession shall be copied on an expedited basis and delivered to the IRS within thirty (30) working days from the date hereof.

4. CONDITIONS

4.1 The obligations on the part of the parties hereto to enter into Phase II described in Paragraph 2.6 hereof are subject to the fulfillment of the following conditions:

(a) IRS and SCHULMAN must be satisfied that the taxes determined to be due under the terms of the within settlement proposal are reasonable under all of the circumstances; provided, however, it is agreed that (i) SCHULMAN Trust income for 1983 and subsequent years will be determined in accordance with the terms of this Agreement and the result of said determination shall not affect this Agreement, and (ii) the examination of SCHULMAN'S 1040 tax returns pertaining to non-post office items shall be accomplished at a later date and the result thereof shall not

impact this Agreement.

(b) The audit result of SCHULMAN'S 1040s for 1977 through 1982 must be acceptable to SCHULMAN and to the IRS; provided, however, it is agreed that (i) SCHULMAN'S 1040 for 1983 will be determined in accordance with the terms of this Agreement and the result of said determination shall not affect this Agreement, and (ii) the examination of SCHULMAN'S 1040 tax returns pertaining to non-post office items shall be accomplished at a later date and the result thereof shall not impact this Agreement.

4.2 In the event that the conditions described in 4.1 are not satisfied and fulfilled prior to the expiration of sixty (60) days following receipt of the records described in Paragraph 3.10 hereof (or at such

earlier time as it appears that any of the conditions will not be satisfied), any party may give written notice to the other party of the cancellation of this Agreement. In such event, the parties hereto shall have no obligation to proceed or continue with Phase II and nothing contained herein shall be deemed an admission of any fact or liability whatsoever on the part of any party hereto. This Settlement Plan Agreement is intended to be used for settlement purposes only and both IRS and SCHULMAN agree that the Agreement, discussions held prior to and in connection with the Agreement, and all schedules and materials previously submitted by SCHULMAN to the Appeals Office (before the date of the execution of this Agreement) in connection with the settlement discussions shall not be used

in any manner whatsoever in any administrative or court proceeding. It is agreed and understood that SCHULMAN Partnership records identified on EXHIBIT B and previously turned over to the IRS may be used for all purposes by the IRS.

5. GOOD FAITH REQUIREMENT

IRS and SCHULMAN agree to exercise the utmost good faith in attempting to settle and resolve the matters described in this Agreement and to execute such documents as are reasonably required to complete Phase II of the settlement plan.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date and at the place set forth opposite their respective signatures.

Executed this 18th
day of August, 1983,
at Los Angeles,
California s/GERALD L. SCHULMAN

INTERNAL REVENUE SERVICE

Executed this 22nd day of August, 1983, at Los Angeles, California

BY: DISTRICT DIRECTOR

s/ WILLIAM H. CONNETT

Executed this 22nd day of August, 1983, at Los Angeles, California

BY: APPEALS OFFICE

By: s/B E TAYLOR

Title: Chief Appeals

Executed this 22nd day of August, 1983, at Los Angeles, California

BY: EXAMINATION DIVISION

By: s/[illegible] [Phonetic: C.R. VanSkysdale]

Title: Chief Examination

District Counsel
Internal Revenue Service
Western Region
Main Post Office
P.O. Box 2031
Los Angeles, California 90053

November 29 1983 CC:LA:TL
JMKamman

Martin N. Gelfand, Esquire
Hochman, Salkin and DeRoy
9011 Wilshire Boulevard
Seventh Floor -- West Tower
Beverly Hills, CA 90212

In re: Gerald L. Schulman

Dear Mr. Gelfand:

This letter is a confirmation and written follow-up to our telephone conversation of Monday, November 28, 1983. My telephone call was prompted by your request of Mr. Lorin Elam as to what "Counsel wanted". Although it is distinctly contrary to my well-known nature, I have attempted to respond to your request without relying upon my usual subtleties.

It [blocking in original] was Counsel's

understanding that Mr. Hochman's initial settlement offer envisioned Mr. Schulman "getting out of the business" and spending the remainder of his natural life managing the existing postal/utility partnership/buildings [sic]. Accordingly, we proceeded, as the negotiations meandered through the laborious, tortuous path of the past year, under the assumption that part and parcel of any settlement was that Mr. Schulman will, as of 11:59 P.M., December 31, 1983, "get out of the business".

It is the uniform government consensus that Mr. Schulman is engaged in the syndication of an "abusive tax shelter". Whether or not you agree with this conclusion is irrelevant, but for the fact that any ultimate settlement must, of necessity, provide the

government with sufficient incentives to enter into the agreement. In this instance, the only [underscore in original] sufficient incentive within the other parameters discussed is the oral, written and contractual committment [sic] of Mr. Schulman that he will not engage in any [underscore in original] Title 26 activity (other than filing timely and correct returns) commencing January 1, 1984. Mr. Schulman is to agree, as offered by Mr. Hochman, to do no more than "sit back and manage the existing buildings/partnerships [sic]". Any contract must provide the government with the equitable remedy of injunction together with substantial liquidated damages in the neighborhood of $50,000,000.00.

At the risk of boring you with

polysyllabic repetition Mr. Schulman will not, directly or indirectly, counsel, organize, assist in the organization of, or participate in the sale of any interest in a partnership or other entity, any investment plan or arrangement, or any other plan or activity involving Title 26. As can be seen, we envision a very broad, comprehensive and all-inclusive proscription. If this is acceptable, "we have a deal".

Counsel's concern and requirement are as outlined above. With respect to the refinancing and "trust" questions, I suggest you discuss these matters with Mr. Elam. If you have any other questions, please telephone me at (213) 688-4636.

Sincerely,

s/JAMES M. KAMMAN
Attorney